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**IN THE  
COURT OF APPEALS OF INDIANA**

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TOWN OF DYER, DYER PLAN COMMISSION	)	
and DYER PARK AND RECREATIONAL BOARD,	)	
	)	
Appellant,	)	
	)	
vs.	)	No. 45A04-0602-CV-68
	)	
RUETH DEVELOPMENT COMPANY, LLC,	)	
	)	
Appellee.	)	

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APPEAL FROM THE LAKE CIRCUIT COURT  
The Honorable Lorenzo Arredondo, Judge  
Cause No. 45D01-9703-CP-274

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**September 29, 2006**

**MEMORANDUM DECISION - NOT FOR PUBLICATION**

**NAJAM, Judge**

## **STATEMENT OF THE CASE**

Town of Dyer, Dyer Plan Commission, and Dyer Park and Recreational Board (collectively, “Dyer”) bring this interlocutory appeal from the trial court’s determination that Rueth Development Company, LLC (“RDC”) may maintain an action for damages against them under 42 U.S.C. § 1983. Dyer presents a single issue for our review, namely, whether the trial court lacked subject matter jurisdiction to hear the claims for § 1983 damages.

We reverse and remand with instructions.

## **FACTS AND PROCEDURAL HISTORY**

RDC owns property in Dyer, Indiana, known as Castlevue Estates. In April of 1996, RDC submitted an application to the Town of Dyer for subdivision approval. As part of the application for subdivision approval, RDC prepared and submitted a master development plan to Dyer as per Dyer’s requirements. The master plan was tentatively approved in September of 1996. Despite that approval, in November of 1996 Dyer amended its zoning ordinance to increase the minimum square footage and minimum frontage requirements of R-2 single family detached housing. That amendment forced RDC to redesign its development and caused a loss of fourteen lots from RDC’s proposed subdivision. The notice for those amendments was given only by publication. As a result of the redesigned plan, RDC was required to seek a variance with the Board of Zoning Appeals. The Board denied the variance.

Consequently, RDC filed its complaint against Dyer, attacking the validity of the zoning ordinance and the zoning amendments, alleging a denial of due process and just

compensation, and requesting damages under § 1983. The trial court granted RDC's motion for summary judgment on July 22, 2003, finding:

that application of the zoning change . . . is invalid and void, as a violation of Plaintiff's constitutional due process rights and a violation of 42 U.S.C. § 1983, that application of said zoning change was an uncompensated taking of Plaintiff's private property and an illegal spot zoning scheme, and that denial of Plaintiff's request for a variance was an abuse of discretion.

Id. at 69. But RDC had asserted three counts for relief under § 1983 without having first pursued a state action in inverse condemnation. Thus, after the trial court granted summary judgment, Dyer filed a motion to dismiss for lack of subject matter jurisdiction on the § 1983 claims. The trial court denied the motion and certified its order for an interlocutory appeal, which we accepted.

### **DISCUSSION AND DECISION**

The standard of review for motions to dismiss for lack of subject matter jurisdiction is a function of what occurred in the trial court. GKN Co. v. Magness, 744 N.E.2d 397, 401 (Ind. 2001). That is, the standard of review is dependent upon: (i) whether the trial court resolved disputed facts; and (ii) if the trial court resolved disputed facts, whether it conducted an evidentiary hearing or ruled on a "paper record." Id. If the facts before the trial court are not in dispute or the trial court determines disputed facts based upon nothing more than a "paper record," our review is de novo. Id. Here, the facts before the trial court on the motion to dismiss were not in dispute. As such, we review the trial court's determination de novo.

The trial court found that a taking without just compensation existed for purposes of § 1983. In order for a § 1983 action for an uncompensated taking to be ripe, a plaintiff

must both “obtain[] a final decision regarding the application of the zoning ordinance and subdivision regulations to its property, [and] utilize[] the procedures [the State] provides for obtaining just compensation.”<sup>1</sup> Williamson County Reg’l Planning Comm’n v. Hamilton Bank, 473 U.S. 172, 186 (1985). As the Supreme Court stated in Williamson County, “[t]he Fifth Amendment does not proscribe the taking of property; it proscribes taking without just compensation.” Id. at 194. As such, “[i]f the [state] government has provided an adequate process for obtaining compensation, and if resort to that process yields just compensation, then the property owner has no claim against the Government for a taking.” Id. at 194-95. Under Indiana law, “[i]t is well established that before proceeding on a § 1983 action, a plaintiff must first pursue a state action [in] inverse condemnation.” Leeper Elec. Serv., Inc. v. City of Carmel, 847 N.E.2d 227, 231 (Ind. Ct. App. 2006). In Leeper, we held that a property owner who did not first seek an inverse condemnation claim with respect to the City of Carmel’s refusal to enact his proposed zoning ordinance was not entitled to seek § 1983 damages as it was not apparent that the State did not intend to pay compensation to the property owner. Id. at 231-33. That is, unless the State’s procedures have been exhausted, claims for damages under § 1983 are unripe.

To recover just compensation for a taking under Indiana law, a party must follow the inverse condemnation procedures outlined in Indiana Code Section 32-24-1-16. Id. at 231. There are two stages in an inverse condemnation action. Town of Georgetown v. Sewell, 786 N.E.2d 1132, 1139 (Ind. Ct. App. 2003). The first stage involves the issue of

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<sup>1</sup> Dyer does not contest that RDC received a final administrative decision at the local level, satisfying the finality requirement of Williamson County. And Dyer did not file a direct appeal from the trial court’s determination that there was an uncompensated taking.

whether a taking of property has occurred. Id. Specifically, the landowner must show that he or she has an interest in land that has been taken for a public use without having been appropriated under eminent domain laws. Id. If the trial court finds that a taking has occurred, then the matter proceeds to the second stage where the court appoints appraisers and damages are assessed. Id.

Here, RDC argues that it is the victim of a regulatory taking. “Indiana recognizes that a ‘taking’ includes any substantial interference with private property which destroys or impairs one’s free use and enjoyment of the property or one’s interest in the property.” Williams v. State, 444 N.E.2d 888, 890 (Ind. Ct. App. 1983). “[W]hile property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking.” Bd. of Zoning Appeals v. Leisz, 702 N.E.2d 1026, 1028 (Ind. 1998) (quoting Penn. Coal Co. v. Mahon, 260 U.S. 393, 414-415 (1922)). In Leisz, our supreme court acknowledged that there are “two discrete categories of regulations that violate the Takings Clause regardless of the legitimate state interest advanced.” Id. at 1028. The first category encompasses regulations that require the property owner to suffer a physical “invasion” of his or her property. Id. at 1028-1029. The second category encompasses regulations that deny all economically beneficial or productive use of land. Id. at 1029.

RDC has not suffered a physical invasion of its property. Therefore the second Leisz category applies. As such, RDC argues that an inverse condemnation action is not available as RDC suffered a loss of only fourteen lots, not a total deprivation of its planned subdivision. In support, RDC relies on the proposition that an “action [in]

inverse condemnation [under Indiana law] is premature until such time as the landowner can establish that his property has been deprived of all economically beneficial or productive use.” Mendenhall v. City of Indianapolis, 717 N.E.2d 1218, 1227-28 (Ind. Ct. App. 1999), trans. denied (emphasis added).

Despite the language in Mendenhall, we have held that deprivation of all economically beneficial use is not a prerequisite to an inverse condemnation action. Where a regulation places limitations on land that fall short of eliminating all economically beneficial use, a taking nonetheless may have occurred, depending on a complex set of factors, including: (1) the regulation’s economic effect on the landowner, (2) the extent to which the regulation interferes with reasonable investment-backed expectations, and (3) the character of the government action. Sewell, 786 N.E.2d at 1139. However, we need not determine whether any of these factors are present. Such a determination involves the issue of whether a taking of property has, in fact, occurred, which is within the scope of an inverse condemnation proceeding. See id.

RDC also contends that, even if available, an inverse condemnation claim would be inadequate in that such a claim would recognize only the value of the fourteen lots lost and would not address its additional engineering expenses or its lost profits from the construction and sale of fourteen homes. RDC’s contentions are not persuasive. “Indiana law allows damages in addition to the fair cash market value of the land actually taken.” State v. Terre Haute, 238 N.E.2d 459, 463 (Ind. 1968). In so stating, our supreme court explicitly allowed for the recovery of allocable engineering expenses when, such as here, the engineering plans and designs were in existence at the time of the

taking. Id. at 464.

Likewise, RDC's argument that it could not recover its lost profits on the fourteen homes says nothing about the adequacy of Indiana's inverse condemnation statute. Lost profits are generally nonrecoverable in any event. "The rule in such a case is that compensation for [the taken] interest does not include future loss of profits . . . or other like consequential losses which would ensue [from] the sale of the property to someone other than the sovereign." United States v. Gen. Motors Corp., 323 U.S. 373, 379 (1945). A prohibition on damages for future uses also is reflected in Indiana law. Terre Haute, 238 N.E.2d at 464. As such, we do not find RDC's two arguments regarding the adequacy of Indiana's inverse condemnation proceedings persuasive.

Finally, RDC maintains that Dyer's motion to dismiss was a waste of judicial resources since Dyer waited almost two full years after the summary judgment order to claim a lack of subject matter jurisdiction. "Subject-matter jurisdiction cannot be waived, and may be raised by the parties or the court at any time, including on appeal." Campbell v. Eckman/Freeman & Assocs., 670 N.E.2d 925, 929 (Ind. Ct. App. 1996). While we do not approve of such a delay in asserting a jurisdictional claim, Dyer's claim was not untimely as a matter of law.

Without considering whether the trial court correctly decided the § 1983 claims, we hold that inverse condemnation proceedings were available to RDC. As such, RDC must avail itself of and exhaust these state proceedings before it may assert a § 1983 claim. Hence, we reverse the trial court's decision on the subject matter jurisdiction issue. We remand with instructions that the trial court vacate its orders on the § 1983

claims and that RDC's § 1983 claims be dismissed without prejudice. See Ondo v. Kemper, 691 N.E.2d 1262, 1263 (Ind. Ct. App. 1998).

Reversed and remanded with instructions.

SHARPNACK, J., and DARDEN, J., concur.